

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9180 of 1995

For Approval and Signature:

HON'BLE MR.JUSTICE SHARAD D.DAVE

- =====
1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

AYURVEDIC OFFICER

Versus

JERAMBHAI KAVABHAI VALA

Appearance:

1. Special Civil Application No. 9180 of 1995
MR DD VYAS for Petitioner No. 1-2
MR SHAILESH C PARIKH for Respondent No. 1
MS PANDIT AGP for Respondent No. 2
-

CORAM : HON'BLE MR.JUSTICE SHARAD D.DAVE

Date of decision: 03/05/2005

ORAL JUDGEMENT

1. The present petition has been filed by the
petitioners under Article 226 of the Constitution of

India challenging the Award dtd.12/10/1994 passed by the Labour Court, Surendranagar in Reference (LCS) No.30 of 1992 whereby the Labour Court directed the petitioners to reinstate the respondent No.1 with continuity of service and to pay cost of Rs.100/-.

2. Mr.DD Vyas, learned counsel for the petitioners has mainly argued that the respondent No.1 was engaged purely on temporary basis for time gape arrangement as part time employee that too as a daily rated employee; that the appointment of the respondent NO.1 was made as per Sec.2(oo)(bb) of the Industrial Disputes Act; the respondent NO.1 was engaged without following required and regular procedure for appointment; the respondent NO.1 has not completed 240 days continuously under the petitioners; that as the regular appointment was made, the service of the respondent NO.1 was terminated. Submitting accordingly, it is prayed to quash the Award passed by the Labour Court. He has also placed reliance on the following decisions;

- [1] AIR 1996 SC 1565
- [2] AIR 1997 SC 3657
- [3] (1992) 4 SCC 99 and
- [4] 2004 (3) GLR 1841 (FB).

3. On the other hand, Mr.Shailesh Parikh, learned counsel for the respondent No.1 has mainly argued that the respondent No.1 has worked for long period and more than 240 days under the respondents, but his service has been terminated illegally, without issuing any notice or notice pay, without holding inquiry, in violation of the principles of natural justice and without following the mandatory procedure. He has further argued that the award passed by the Labour Court is just legal and proper and while passing the Award, the Labour Court has not committed any error and hence this Court may not interfere with the finding of the Labour Court in this petition under Article 226 of the Constitution of India considering the scope of this Court under the said Article. Consequently, he has prayed not to interfere with the impugned Award and dismiss the petition. He has also placed reliance on the following decisions;

- [1] AIR 1999 SC 1540
- [2] AIR 1999 SC 1542
- [3] 2002 SCC (L&S) 1087
- [4] 1990 LAB.I.C. 100
- [5] 1990 LAB.I.C. 104
- [6] 2001 LAB.I.C. 662
- [7] 1982 LAB.I.C. NOC 125 (Patna).
- [8] 2004 SCC (L&S) 36
- [9] AIR 2003 SC 3553 and

4. Ms. Pandit learned AGP for the respondent No.2 has supported the case of the petitioners and argued to quash and set aside the Award impugned in the petition.

5. Having heard the learned counsel for the respective parties, considering the evidence on record, relevant case laws, and Record & Proceedings of the Labour Court, it is clear that the respondent No.1 was appointed on temporary basis and without following required procedure for appointment and therefore, it can be said that the appointment of the respondent No.1 was not regular appointment but the same was back door entry.

5.1 In view of the above facts, it is pertinent to note that the Hon'ble Supreme Court in the case of Himanshu Kumar Vidyarthi and others Vs. State of Bihar and others, reported in AIR 1997 SC 3657, has held as under;

"3. ...The main grievance of the petitioners before us is that termination of their services is in violation of Section 25-F of the Industrial Disputes Act, 1947. The question for consideration, therefore, is whether the petitioners can be said to have been "retrenched" within the meaning of Sec.25-F of the Industrial Disputes Act? Every Department of the Government cannot be treated to be "industry" when the appointments are regulated by statutory rules, the concept of "industry" to that extent stands excluded. Admittedly, they were not appointed to the posts in accordance with the rules but were engaged on the basis of need of the work. They were not appointed to the posts in accordance with the rules but were engaged on the basis of need of the work. They are temporary employees working on daily wages. Under the circumstances, their disengagement from service cannot be construed to be a retrenchment under the Industrial Disputes Act. The concept of "retrenchment", therefore, cannot be stretched to such an extent as to cover these employees. The learned counsel for the petitioners seeks to contend that in the High Court, the petitioners did not contend that it is a case of retrenchment but termination of their service is arbitrary. Since they are not daily wage employees and have no right to the posts, their disengagement is not arbitrary.

4. The special leave petition is accordingly dismissed."

5.2. Further, the Hon'ble Supreme Court in the case of State of Himachal Pradesh Vs. Suresh Kumar Verma and another, reported in AIR 1996 SC 1565, in para 2 has held as under;-

"2. We have heard the counsel on both sides. This appeal by special leave arises from the orders passed by the High Court of Himachal Pradesh. In this case in C.W.P.No.722/93 dated 10/9/1993, the Division Bench of the High Court has disposed of the matters on the ground that the respondents were reengaged as Assistant Development Offices on daily wages pursuant to the directions by it. It is settled law that having made rules of recruitment to various services, under the State or to a class of posts under the State, the State is bound to follow the same and to have selection of the candidates made as per recruitment rules and appointments shall be made accordingly. From the date of discharging the duties attached to the post the incumbent becomes a member of the services. Appointment on daily wage basis is not an appointment to a post according to the Rules."

5.3. Further, the Larger Bench of this Court in the case of Amreli Municipality Vs. Gujarat Pradesh Municipal Employees Union, reported in 2004 (3) GLR 1841, in para 2.1.13, has issued the following guidelines:-

- "(1) If casual workers or daily rated workers are not required by the Local bodies and whose services are likely to be terminated, they should be relieved on the principle of "last come, first go". In the event of filling up the posts in future, those who are eligible and qualified from and amongst the relieved workmen shall be preferred by waiving the age limit.
- (2) If the workmen who have continued for years as temporary employees, in the event of their termination, the authorities will see that no unqualified person is appointed in their place.
- (3) The question of regularization can also be considered by the authorities before terminating services provided the workers are eligible on the sanctioned posts.
- (4) If the posts are not sanctioned, the authorities may take such steps which are necessary in

accordance with the provisions of law/rules/circulars within the budgetary provisions."

5.4. Further, the Hon'ble Supreme Court in the case of Delhi Development Horticulture Employees' Union Vs. Delhi Administration, Delhi and others, reported in (1992) 4 SCC 99, has held as under;-

"The object of the scheme was not to provide the right to work as such even to the rural poor - much less to the unemployed in general. No fault can be found with the limited object of the scheme given the limited resources at the disposal of the State. Those employed under the scheme, therefore, could not ask for more than what the scheme intended to give them. To get an employment under such scheme and to claim on the basis of said employment, a right of regularization, is to frustrate the scheme itself. No court can be a party to such exercise. It is wrong to approach the problems of those employed under such schemes with a view to providing them with full employment and guaranteeing equal pay for equal work. These concepts, in the context of such schemes are both unwarranted and misplaced. They will do more harm than good by depriving the many of the little income that they may get to keep them from starvation. They would benefit a few at the cost of the many starving poor for whom the schemes are meant. That would also force the State to wind up the existing schemes and forbid them from introducing the new ones, for want of resources. This is not to say that the problems of the unemployed deserve no consideration or sympathy. This is only to emphasise that even among the unemployed a distinction exists between those who live below and above the poverty line, those in need of partial and those in need of full employment, the educated and uneducated, the rural and urban unemployed etc.

(Paras 21 and 22).

Though broadly interpreted and as a necessary logical corollary, right to life would include the right to livelihood and, therefore, right to work, but this is in the context of Article 21 which seeks to protect persons against the deprivation of their life except according to procedure established by law. This country has so far not found it feasible to incorporate the right to livelihood as a fundamental right in the Constitution. This is because the country has so far not attained the

capacity to guarantee it, and not because it considers it any the less fundamental to life. Advisedly, therefore, it has been placed in the Chapter on Directive Principles of Article 41 of which enjoins upon the State to make effective provision for securing the same "within the limits of its economic capacity and development". Thus even while giving the direction to the State to ensure the right to work, the Constitution makers thought it prudent not to do so without qualifying it.

(Para 20)

Olga Tellis V. Bombay Municipal Corporation,
(1985) 3 SCC 545; AIR 1986 SC 180, referred to.

Although there is Employment Exchange Act which requires recruitment on the basis of registration in the Employment Exchange, it has become a common practice to ignore the Employment Exchange and the persons registered in the Employment Exchanges, and to employ and get employed directly those who are either not registered with the Employment Exchange or who though registered are lower in the long waiting list in the Employment Register. The courts can take judicial notice of the fact that such employment is sought and given directly for various illegal considerations including money. The employment is given first for temporary periods with technical breaks to circumvent the relevant rules, and is continued for 240 days or more days with a view to give the benefit of regularization knowing the judicial trend that those who have completed 240 or more days are directed to be automatically regularised. A good deal of illegal employment market has developed resulting in a new source of corruption and frustration of those who are waiting at the Employment Exchange for years. Not all those who gain such backdoor entry in the employment are in need of the particular jobs. Though already employed elsewhere, they join the jobs for better and secured prospects. That is why most of the cases which come to the courts are of employment in government departments, public undertakings or agencies. Ultimately it is the people who bear the heavy burden of the surplus labour. The other equally injurious effect of indiscriminate regularization has been that many of the agencies have stopped undertaking casual or temporary works though they are urgent and essential for fear that if those who are employed on such works are required to be continued for 240 days or more days they have to be absorbed as regular employees although the works are time-bound and there is no need of the workmen beyond the completion of the works undertaken. The public interest are thus jeopardised on both counts.

(Para 23)

In the circumstances, it is not possible to accede the request of the petitioners that the respondents be directed to regularise them. The most that can be done for them is to direct the respondent Delhi Administration to keep them on a panel and if they are registered with the Employment Exchange and are qualified to be appointed on relevant posts, given them a preference in employment whenever there occurs a vacancy in the regular posts, which direction we give hereby.

(Para 24)"

6. Considering the facts and circumstances of the case and ratio laid down by the Hon'ble Apex Court in the above judgements, I am of the opinion that the Labour Court failed to consider the relevant facts and law and the impugned Award is illegal. The petition is, therefore, required to be allowed and is accordingly allowed. The impugned Award dtd.12/10/1994 passed by the Labour Court, Surendranagar in Reference (LCS) No.30 of 1992 is hereby quashed and set aside.

7. However, the petitioners and the respondent No.2 are directed that if the respondent No.1 workman is registered with the Employment Exchange and is qualified to be appointed on the post, give him a preference in employment whenever there occurs a vacancy in the regular post.

8. I am in total agreement with the judgements cited by the learned counsel for the respondent No.1, but the same are not applicable to the peculiar facts of the case on hand.

9. Rule is made absolute to the aforesaid extent with no order as to costs.

R & P be sent back.

(S.D. DAVE, J.)

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